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NO. 58796-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CHADWICK FARMS OWNERS ASSOCIATION,
a Washington nonprofit corporation,
Plaintiff/Appellant,

v.

FHC LLC, a Washington limited liability company,
Defendant/Third Party Plaintiff/ Respondent/Cross-Appellant,

v.

AMERICA 1ST ROOFING & BUILDERS, INC., a Washington
corporation; CASCADE UTILITIES, INC., a Washington
corporation; MILBRANDT ARCHITECTS, INC., P.S., a
Washington corporation; PIERONI ENTERPRISE, INC., d/b/a
PIERONI'S LANDSCAPE CONSTRUCTION, a Washington
corporation; TIGHT IS RIGHT CONSTRUCTION, INC., a
Washington corporation; GUTTER KING, INC., a Washington
corporation, Third Party Defendants/Cross-Respondents.

APPELLANT CHADWICK FARM'S ANSWER TO WSBA'S AND
WSTLA FOUNDATION'S AMICUS CURIAE BRIEFS

Mary H. Spillane, WSBA #11981
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Appellant

Two Union Square
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
(206) 628-6600

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I. INTRODUCTION

The Washington State Trial Lawyers Association Foundation (“WSTLA Foundation”) and the Washington State Bar Association (“WSBA”), at the Court’s request, each submitted an amicus curiae brief addressing the following issues:

1. The applicability, if any, of Ballard Square Condo. Owners Ass’n v. Dynasty Constr. Co., [158 Wn.2d 603, 146 P.3d 914 (2006)] to limited liability companies;
2. What remedies are available after dissolution under RCW 25.15.303 and whether the section applies only to actions against a limited liability company, rather than actions by a limited liability company;
3. Whether a certificate of cancellation means something more than a dissolution, and, in particular, the effect of the following language in RCW 25.15.295(2):

Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company’s affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company’s business, dispose of and convey the limited liability company’s property, discharge or make reasonable provision for the limited liability company’s liabilities, and distribute to the members any remaining assets of the limited liability company. (Emphasis added).

4. What is the retroactive effect, if any, of the 2006 amendments to RCW 25.15.303, and what the amendments mean in the context of a certificate of cancellation;

5. Whether the common law has any application to limited liability companies, and, if so, how the common law applies.

While Chadwick Farms Owners Association agrees with most of the WSTLA Foundation's analysis of these issues, it disagrees with most of the WSBA's analysis. Most importantly, Chadwick Farms disagrees with the assertions made in the WSBA's brief to the effect that (1) the mere passage of the two-year reinstatement period following a limited liability company's administrative dissolution ends the winding-up process, such that the limited liability company can no longer defend or prosecute suits and all pending claims against it abate; or (2) that the ability of a claimant, under RCW 25.15.303, to bring a claim against a limited liability company within three years of the effective date of the limited liability company's dissolution can be foreshortened by either the expiration of the two-year reinstatement period or the filing of a certificate of cancellation of the limited liability company's certificate of formation.

II. ARGUMENT

- A. Neither the Ballard Square Decision, Which Involved Interpretation of the Washington Business Corporation Act, Nor the Common Law, Applies to Limited Liability Companies or to the Question of When Claims By or Against Them Abate.

The WSBA correctly acknowledges that limited liability companies “are creatures of statute; they did not exist at common law,” WSBA Br. at 22, and that “[u]nhelpfully, courts and scholars routinely comment that LLCs share some qualities of corporations and other qualities of partnerships; they cite by analogy to state corporation acts, to state partnership acts, or to the common law, often without meaningful explanation.” WSBA Br. at 6. Although the WSBA also correctly recognizes that “the only *relatively* sure footing here is in the language of the [LLC] Act itself,” WSBA Br. at 6, the WSBA then inexplicably and unconvincingly concludes that Ballard Square Condo. Owners Ass’n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3 914 (2006), and the common law apply to LLCs by “compelling legal analogy,” WSBA Br. at 3, 19. Chadwick Farms strongly disagrees.

This case does not concern a business corporation, for which some common law existed, nor does it concern any provisions of the Washington Business Corporation Act, RCW Title 23B, which the Ballard Square court had to construe and which the Ballard Square court concluded had “replaced the common law rule in its entirety.” Ballard

Square, 158 Wn.2d at 610. This case concerns a limited liability company, which is purely a creature of statute, a creature not of the Washington Business Corporation Act, but of the Washington Limited Liability Company Act, RCW Ch. 25.15, and for which no common law exists. Thus, the WSBA's analogy to Ballard Square, or to a common law rule pertaining to business corporations which, according to the Ballard Square court has been replaced in its entirety by the Washington Business Corporation Act, is an equally unhelpful analogy for which no meaningful explanation exists.

The only "sure footing" for deciding whether Chadwick Farms' pending and already filed claims against FHC LLC, or FHC LLC's claims against the third-party defendants, could continue to be pursued once two years had passed without FHC LLC seeking reinstatement following its administrative dissolution is the language of the Washington Limited Liability Company Act statutes themselves. When those statutes are read in *pari materia*, without rendering any word or provision meaningless, and are construed so as to avoid absurd and fundamentally unjust results, as they must be, e.g., City of Pasco v. Napier, 109 Wn.2d 769, 773, 755 P.2d 170 (1988); State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994); State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282, cert. denied, 531 U.S. 984 (2000); Kilian v. Atkinson, 147 Wn.2d 16, 21, 50

P.3d 638 (2002), neither Chadwick Farms' claims against FHC LLC, or FHC LLC's claims against the third-party defendants, should have been dismissed. Contrary to the WSBA's analysis, under Washington's Limited Liability Company Act, the mere passage of two years without reinstatement following a limited liability company's administrative dissolution does not abate pending claims against the limited liability company, end its winding up process, or preclude it from suing or being sued.

B. Under the Limited Liability Company Act, a Certificate of Cancellation Means More than a Dissolution and, Until the Filing of a Certificate of Cancellation, a Limited Liability Company that Has Dissolved, Administratively or Otherwise, May Continue Winding up its Affairs, and Defending and Prosecuting Suits.

The WSTLA Foundation, WSTLA Br. at 16-20, and the WSBA, WSBA Br. at 6, 11, correctly observe that cancellation and dissolution of a limited liability company do not mean the same thing. As the WSBA correctly states, WSBA Br. at 11, "a certificate of cancellation' absolutely means something more than 'dissolution'" under the Limited Liability Company Act. But, while the WSTLA Foundation, WSTLA Br. at 16-20, correctly applies the distinction between cancellation and dissolution with respect to RCW 25.15.303, the WSBA misapplies the distinction with respect to both RCW 25.15.295(2) and RCW 25.15.303. Contrary to the WSBA's assertions, WSBA Br. at 11, 15, 23, a limited liability company

does not cease to exist, and its winding up period does not end, such that it can no longer sue or be sued, just because two years elapse without reinstatement following administrative dissolution.

Under RCW 25.15.285(3), the administrative dissolution of a limited liability company does not end its existence. Rather, under RCW 25.15.285(3):

A limited liability company administratively dissolved continues its existence but may not carry on any business except as necessary to wind up and liquidate its business and affairs.

Under RCW 25.15.295(2) and RCW 25.15.300(2), such winding up includes prosecuting and defending suits and paying or making reasonable provision to pay all claims and obligations, including contingent, conditional, and unmatured ones, known to the limited liability company.

Nowhere in the Limited Liability Company Act is any specific time limit placed on how long a limited liability company has after it is dissolved, whether administratively or otherwise, to complete the winding up of its affairs. Contrary to the WSBA's analysis, the mere fact that RCW 25.15.290(4)¹ provides that the Secretary of State "shall cancel" a

¹ RCW 25.15.290(4) states:

If an application for reinstatement is not made within the two-year [reinstatement] period set forth in subsection (1) of this section, or if the application made within this period is not granted, the secretary of state shall cancel the limited liability company's certificate of formation.

limited liability company's certificate of formation if the limited liability company does not seek reinstatement within two years after its administrative dissolution, does not mean that the limited liability company cannot continue winding up its affairs, including prosecuting and defending suits and paying known claims and obligations, past that two-year mark. The statute does not specify how, when, or in what form the Secretary of State is to ultimately accomplish the cancellation of the certificate of formation. Nor does the statute indicate that the limited liability company ceases to exist for purposes of winding up, or that all claims by or against the limited liability company abate, immediately on the expiration of the two-year reinstatement period. What the statute means is that the company can no longer be reinstated, not that it can no longer finish winding up its affairs.

Indeed, it is the second sentence of RCW 25.15.080 that addresses how a cancellation of a certificate of formation is to be accomplished, and RCW 25.15.295(2) that addresses when the persons winding up a limited liability company can no longer, as part of winding up its affairs, prosecute or defend suits in the company's name. According to those statutes, a certificate of cancellation must be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the dissolution and completion of the winding up process,

and persons winding up the limited liability company's affairs can continue to do so, including prosecuting and defending suits, until the filing of the certificate of cancellation. RCW 25.15.080 provides:

A certificate of formation shall be canceled upon the effective date of the certificate of cancellation, or as provided in RCW 25.15.290, or upon the filing of articles of merger if the limited liability company is not the surviving or resulting entity in a merger. *A certificate of cancellation shall be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company.* . . . [Emphasis added.]

RCW 25.15.295(2) in turn provides:

Upon dissolution of a limited liability company *and until the filing of a certificate of cancellation* as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company. [Emphasis added.]

Nowhere does the Limited Liability Company Act state that the winding up of an administratively dissolved limited liability company's affairs, which includes prosecuting and defending suits, must be completed on or before the expiration of the two-year reinstatement period. Indeed, RCW 25.15.270 indicates quite the opposite, when it

provides that a limited liability company is dissolved and its affairs shall be wound up "**upon**," not **by** (or as of), the expiration of two years after the effective date of an administrative dissolution without reinstatement, in the same way that a limited liability company is dissolved and its affairs shall be wound up "**upon**," not **by** (or as of), the written consent of all members, or the entry of a decree of judicial dissolution. RCW 25.15.270 provides in pertinent part:

A limited liability company is dissolved and its affairs shall be wound up **upon** the first to occur of the following:

* * *

(3) The written consent of all members;

* * *

(5) The entry of a decree of judicial dissolution under RCW 25.15.275; or

(6) The expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company. [Emphasis added.]

It cannot seriously be contended that, in cases where dissolution occurs by written consent of the members or judicial decree, that the winding up of the limited liability company's affairs has to be completed before the consent or decree is obtained.

The WSBA is simply incorrect when it asserts that an administratively dissolved limited liability company ceases to exist, and can no longer engage in any winding up activities, including prosecuting

and defending suits, once the two-year reinstatement period expires. Reading all of the key provisions of the Washington Limited Liability Company Act in their entirety and so as to avoid unjust and absurd results, a limited liability company may be administratively dissolved, but can still wind up its affairs (including prosecuting and defending suits) during and after the two-year reinstatement period, until the winding up (including paying or making reasonable provisions for payment of known claims) is complete and a certificate of cancellation is filed.

C. RCW 25.15.303 Applies Retroactively and Confirms that Claims Against an Administratively Dissolved Limited Liability Company Do Not Abate Merely Because of the Passage of the Two-Year Reinstatement Period.

The WSTLA Foundation, WSTLA Br. at 11-14, and the WSBA, WSBA Br. at 16-18 correctly note, that RCW 25.15.303 should be applied retroactively because it is remedial. RCW 25.15.303 should also be applied retroactively because it is curative.² The WSBA's assertion, WSBA Brief at 18, that RCW 25.15.303 is not "curative in nature," ignores the fact that RCW 25.15.303 clarifies existing law with respect to the preservation of remedies when limited liability companies dissolve, a matter as to which some ambiguity existed.

² The WSTLA Foundation recognizes, WSTLA Br. at 12 n. 5, that RCW 25.15.303 may also be curative so as to warrant retroactive application on that basis as well.

A statutory amendment is curative if it clarifies or technically corrects an ambiguous statute. McGee Guest Home, Inc. v. Dep't of Social & Health Servs., 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (quoting In re F.D. Processing, Inc., 119 Wn.2d 452, 461, 832 P.2d 1303 (1992)). "A statutory amendment is remedial if it relates to practice, procedures, or remedies and does not affect a substantial or vested right." Robin L. Miller Constr. Co. v. Coltran, 110 Wn. App. 883, 891, 43 P.3d 67 (2002).

"When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law." In re Personal Restraint of Matteson, 142 Wn.2d 298, 308, 12 P.3d 585 (2000) (quoting Tomlinson v. Clarke, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992)).

Here, RCW 25.15.303 was enacted during controversies about the meaning of the law with respect to the preservation of remedies against both business corporations and limited liability companies when they dissolve, and does not contravene any previous construction of the Washington Limited Liability Company Act by this Court. Thus, being both curative and remedial, RCW 25.15.303 should be applied retroactively.

RCW 25.15.303 provides:

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be defended by the limited liability company in its own name.

Under RCW 25.15.303, claims can proceed against a dissolved limited liability company – whether it is dissolved voluntarily, judicially, or administratively – so long as the action on those claims is brought within three years after the effective date of the dissolution. RCW 25.15.303, which should apply retroactively because it is both remedial and curative, confirms that, as long as they are brought within three years of the effective date of a limited liability company's dissolution, claims against a limited liability company do not abate simply because the two-year reinstatement period for an administratively dissolved limited liability company expires, or because a dissolved limited liability company files a certificate of cancellation.

The WSTLA Foundation, WSTLA Br. at 16-20, correctly recognizes that, under RCW 25.15.303, cancellation of a limited liability company does not result in abatement of claims against it, so long as the claims are brought within three years of the effective date of the limited

liability company's dissolution. The WSBA, however, compounding its erroneous analysis of the provisions of the Washington Limited Liability Company Act as they existed prior to the enactment of RCW 25.15.303, erroneously concludes that RCW 25.15.303 changes nothing and has no applicability with respect to administratively dissolved limited liability companies that fail to seek reinstatement within two years, or with respect to dissolved limited liability companies that file certificates of cancellation.

The WSBA's proffered construction of RCW 25.15.303, if adopted by the Court, would completely eviscerate and render meaningless, the 3-year survival of claims provision that the Legislature enacted. Such an interpretation of RCW 25.15.303 would be wholly contrary to the Legislature's intent, especially when the Legislature, in the House Bill Report for SB 6531, identified the gap it was trying to close by noting that, in the Limited Liability Company Act it was amending, "there is no provision regarding the preservation of claims following cancellation of the certificate of formation." See House Bill Report, SB 6531, at 3.

Moreover, the WSBA's proffered construction would lead to absurd and fundamentally unjust results. Under the WSBA's proffered construction, an administratively dissolved limited liability company could simply ignore its obligations to pay or make reasonable provision for the

payment of known claims, do nothing for two years following administrative dissolution, and watch all pending or known claims or obligations evaporate. And, a dissolved limited liability company could equally evade all pending or known claims simply by filing a certificate of cancellation. To allow the passage of the two-year reinstatement period or the filing of a certificate of cancellation to defeat the survival of claims would render RCW 25.15.303 meaningless. As WSTLA Foundation correctly observes, WSTLA Br. at 19 (citing Senate Bill Report, SB 6531, at 1), the clear purpose of RCW 25.15.303 “is to provide a definite three-year period for the survival of claims, and thus ‘remove[]an incentive for LLCs to act in bad faith.’”

To the extent that RCW 25.15.303 needs any construction beyond its plain language, it should be construed consistent with its purpose, to provide a definite three-year period following dissolution of a limited liability company for survival of claims against it, irrespective of whether the two-year reinstatement period following administrative dissolution has expired, or the limited liability company has filed a certificate of dissolution.

III. CONCLUSION

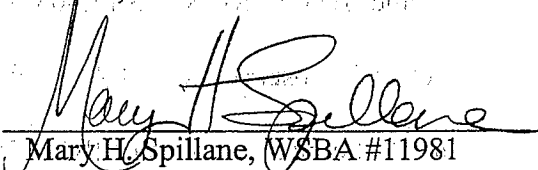
For the foregoing reasons, and those set forth in Chadwick Farms’ prior briefs, the trial court’s order granting FHC LLC’s motion for

summary judgment dismissing Chadwick Farms' claims – claims that were brought well before the expiration of FHC LLC's two-year reinstatement period and less than three years after the effective date of its administrative dissolution – should be reversed and the case remanded for resolution of those claims.

RESPECTFULLY SUBMITTED this 6th day of March, 2007.

WILLIAMS, KASTNER & GIBBS PLLC

By


Mary H. Spillane, WSBA #11981

Attorneys for Appellant

Two Union Square
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, WA 98111-3926
(206) 628-6600

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2007, I caused a true and correct copy of the foregoing document to be mailed, postage prepaid, to the following parties and counsel of record:

Counsel for Defendant/Third-Party Plaintiff/Respondent FHC LLC:

John P. Hayes, WSBA #21009
Viivi M. Vanderslice, WSBA #34990
FORSBERG & UMLAUF, P.S.
900 Fourth Avenue, Suite 1700
Seattle, WA 98164-1039

Counsel for Third Party Defendant America 1st Roofing & Builders, Inc.:

R. Scott Fallon, WSBA #02574
FALLON & MCKINLEY
1111 Third Avenue, Suite 2400
Seattle, WA 98101

Counsel for Third Party Defendant Cascade Utilities, Inc.:

Jonathan Dirk Holt, WSBA #28433
Vicky L. Strada, WSBA #34559
SCHEER & ZEHNDER LLP
701 Pike St Ste 2200
Seattle, WA 98101-2358

Counsel for Third Party Defendant Milbrandt Architects, Inc., P.S.:

Martin T. Crowder, WSBA #02140
Michaelanne Ehrenberg, WSBA #25615
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028

Counsel for Third Party Defendant Pieroni Enterprise, Inc.,
d/b/a Pieroni Landscape Construction:

W. Scott Clement, WSBA #16243
John E. Drotz, WSBA #22374
CLEMENT & DROTZ PLLC
Pier 70
2801 Alaskan Way Ste 300
Seattle, WA 98121-1128

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Counsel for Third Party Defendant Gutter King Corp.:

David J. Bierman, WSBA # 14270
ALEXANDER & BIERMAN, P.S.
4800 Aurora Ave. N.
Seattle, WA 98103

Counsel for Plaintiff/Respondent Emily Lane Homeowners Ass'n:

Leonard D. Flanagan, WSBA #20966
Justin D. Sudweeks, WSBA #28755
LEVIN & STEIN
201 Queen Anne Ave N Ste 400
Seattle, WA 98109-4824

Counsel for Defendant/Appellant/Cross-Respondent Colonial
Development LLC Defendant The Almark Corporation, Contempra
Homes, Inc., Critchlow Homes, Inc., Mark E. Schmitz, Richard E.
Wagner and Esther Wagner d/b/a Woodhaven Homes, Alfred J. Mus, and
Jeffrey Critchlow:

Eileen I. McKillop, WSBA #21602
OLES MORRISON RINKER & BAKER
701 Pike Street, #1700
Seattle, WA 98101

Counsel for Amicus WSBA:

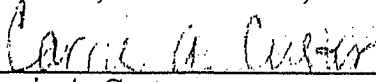
Paul H. Beattie, WSBA #30277
DARBY & DARBY, P.C.
1191 Second Ave., 20th Floor
Seattle, WA 98101-3404

Ellen Conedera Dial, WSBA #09522
WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539

Counsel for Amicus WSTLA:

Debra L. Stephens, WSBA #23013
6210 E. Lincoln Lane
Spokane, WA 99217
Bryan P. Harnetiaux, WSBA #05169
517 E. 17th Ave.
Spokane, WA 99203

Dated this 6th day of March, 2007 at Seattle, Washington.



Carrie A. Custer